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No. 57828-0-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

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Vitaliy Kertchen  
Appellant,

vs.

Washington State Patrol  
Respondent.

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Appellant's Opening Brief

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### ASSIGNMENT OF ERROR

The trial court erred when it ruled that RCW 43.43.710 exempts Washington State Patrol's production, under the Public Records Act, of a court disposition report pertaining to a criminal conviction.

### ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is RCW 43.43.710 an "other statute" exemption for the purposes of the Public Records Act, where the requested record held by Washington State Patrol is a court disposition report pertaining to a criminal conviction?

### STATEMENT OF THE CASE

On June 2, 2021, appellant filed a public disclosure request with Washington State Patrol (WSP), requesting disposition reports WSP received from Lynnwood Municipal Court and Federal Way District Court for two different cases. Clerk's Papers (CP) at 14-15. The disposition reports requested

for each case related to an arrest record that WSP had classified and reported as a conviction. CP at 18-27.

On June 14, WSP responded, denying the request in full because “[c]riminal history record information (CHRI) and source documents are not provided under the public disclosure statute.” CP at 28-30. The response did not cite any legal authority, so appellant requested citation to specific statutory authority for the denial. *Id.* WSP replied that [CHRI] is disseminated pursuant to the provision so Chapter 10.97 RCW, rather than the Public Records Act.” CP at 31-32. The reply also cited RCW 43.43.710. *Id.*

On May 9, 2022, appellant filed a Public Records Act (PRA) action against WSP in Thurston County Superior Court. CP at 1-3. Following briefing and argument, the trial court dismissed the complaint, finding that RCW 43.43.710 is an “other statute” that exempts the requested records from disclosure under the PRA. CP at 78-81.

Appellant filed this timely appeal. CP at 82-86.

## ARGUMENT

The PRA is a “strongly worded mandate for broad disclosure of public records.” *Hornbuckle v. Dep’t of Soc. & Health Servs.*, 2022 Wash. App. LEXIS 1854 at \*5, 2022 WL 4462348 (Sept. 26, 2022), ordered published Nov 21, 2022. In reviewing PRA claims, courts shall consider that “free and open examination of public records is in the public interest.” *Id.* at \*5-6. Agencies are required to disclose records “unless the record falls within the specific exemptions [listed in the PRA], or other statute which exempts or prohibits disclosure of specific information or records.” *Id.* at \*6. An “other statute” must explicitly identify an exemption, courts are not allowed to imply an exemption. *Id.* Exemptions are narrowly construed and agencies carry the burden of proving that a qualified exemption applies. *Id.*

There is no dispute that WSP is an “agency” and that the requested records are “public records,” as defined in RCW

42.56.010. The only dispute is whether the requested records are exempt from disclosure.

In its initial response, WSP stated that CHRI is disseminated pursuant to RCW 10.97 rather than the PRA, but also cited RCW 43.43.710. CP at 31-32. Below, WSP argued only that RCW 43.43.710 formed the basis for the denial as an “other statute.” CP at 33-53. The trial court did not consider RCW 10.97 and found only that RCW 43.43.710 provides a valid exemption. CP at 78-81.

RCW 10.97 is a comprehensive legislative expression of what records are subject to disclosure and in what circumstances. It explicitly authorizes release of certain information and prohibits release of other information. RCW 43.43.710, on the other hand, is a conclusory directive that no records be released, save for in one very narrow circumstance. If RCW 43.43.710 controls, then RCW 10.97 is rendered meaningless. Resolving this matter requires harmonizing RCW 43.43.710 with RCW 10.97. *Hornbuckle* at \*11 (“Where it is

possible to do so, we have an obligation to harmonize statutes.”).

Here, the only way to harmonize the statutes is to hold that RCW 43.43.710 exempts disclosure only of records which did not result in a conviction. Otherwise, RCW 43.43.710 must give way to the CRPA. Either way, RCW 43.43.710 does not apply as an “other statute” in this context.

**A. RCW 43.43.710 conflicts with RCW 10.97.**

**1. RCW 10.97.**

RCW 10.97 is named the Washington State Criminal Records Privacy Act (CRPA). RCW 10.97.020. The CRPA’s purpose is to “provide for the completeness, accuracy, confidentiality, and security of criminal history record information.” RCW 10.97.010. With respect to dissemination of CHRI, the CRPA creates two categories of data - “conviction record” and “nonconviction data.” RCW 10.97.030(3), (8).

The CRPA defines “conviction record” as “[CHRI] related to an incident which has led to a conviction or other



disposition adverse to the subject.” RCW 10.97.030(3). It defines “nonconviction data” as “all [CHRI] relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending.” RCW 10.97.030(8). It authorizes unrestricted dissemination of conviction records, RCW 10.97.050(1), but imposes limitations on dissemination of nonconviction data. RCW 10.97.050(3)-(6). “Dissemination” is defined as “disclosing CHRI or disclosing the absence of CHRI to any person or agency outside the agency possessing the information.” RCW 10.97.030(7).

Among other things, the CRPA also provides definitions of various terms of art, RCW 10.97.030; addresses deletion of nonconviction data, RCW 10.97.060; authorizes collection of fees, RCW 10.97.100; creates civil and criminal penalties, RCW 10.97.110, RCW 10.97.120; and designates WSP as the “agency of state government responsible for the administration of the [CRPA],” RCW 10.97.090.

In other words, the CRPA is a comprehensive manifestation of legislative policy regarding access to criminal records and explicitly allows unrestricted dissemination of conviction records.

2. RCW 43.43.710.

RCW 43.43.710 states that “[i]nformation contained in the files and records of the section relative to the commission of any crime by any person shall be considered privileged and shall not be made public.” The only exception is with a court order in the context of a civil proceeding, which does not apply here. According to Lexis, RCW 43.43.710 has never been discussed or even cited in any appellate decision, while RCW 10.97 has been cited in various contexts approximately a dozen times.

Reading the statute in a vacuum, it certainly seems to support WSP’s argument, but its true meaning is less clear. If RCW 43.43.710 prohibits WSP from disseminating *any*

information, then why does RCW 10.97 explicitly authorize unrestricted dissemination as it relates to conviction records? And how does WSP operate its Washington Access To Criminal History (WATCH) program - an online application where any member of the public can order a conviction report on anyone else for \$11?<sup>1</sup> WSP actively sells to the public the very information it argues is protected from public disclosure. RCW 43.43.710 doesn't facially discriminate between conviction data and nonconviction data, so is WSP violating the law by selling these conviction reports? Why does WSP get to pick and choose which scheme to apply to serve its own purposes?

RCW 43.43.710 was first enacted in 1972. Laws of 1972, 1st Ex. Sess., ch. 152, § 3. The CRPA was enacted five years later, in 1977. Laws of 1977, 1st Ex. Sess., ch. 314. It seems like the CRPA's purpose was likely to supersede RCW

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<sup>1</sup> <https://watch.wsp.wa.gov>

43.43.710 and provide a more robust chapter dealing with access to criminal records. However, both statutes have been amended multiple times since the 70s and RCW 43.43 has been modified to refer to RCW 10.97, but RCW 43.43.710 has not been repealed. RCW 43.43.815(1), RCW 43.43.830(6). The only thing that is clear is that the two statutes are in direct conflict and require harmonization.

**B. RCW 43.43.710 must be harmonized with RCW 10.97 or set aside.**

“The purpose of reading statutory provisions *in pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998). It is the duty of the court to reconcile apparently conflicting statutes and to give effect to

each of them, if this can be achieved without distortion of the language used.” *Id.* at 335.

In order to harmonize RCW 43.43.710 with the CRPA, its application must be limited to records that did not result in a conviction. Otherwise, RCW 43.43.710 must be considered a general statute that gives way to the CRPA, a specific statute.

1. RCW 43.43.710’s application must be limited to records that did not result in a conviction.

RCW 43.43.710’s use of the term “commission” must be limited to refer to a crime that was committed or alleged but which did not result in a conviction. Such an interpretation tracks the CRPA’s scheme of “conviction record” and “nonconviction data.” In other words, RCW 43.43.710’s reference to “commission of any crime” is analogous to the CRPA’s definition of “nonconviction data.” “[C]ommission of any crime” cannot be interpreted to include convictions because then RCW 43.43.710 and the CRPA would be in direct conflict.

The only way to resolve the conflict is to limit the use of the term “commission” to those crimes that were committed or alleged but for which no conviction was entered. The legislature has recognized that a person may commit a crime for which he or she is not convicted in other contexts as well. *See, e.g.*, RCW 9.94A.525(2)(b), (2)(c) (prior felony convictions wash from an offender score when “the offender had spent [ten or five] consecutive years in the community without *committing* any crime that subsequently results in a *conviction*.”) (emphasis added). By adopting this interpretation of RCW 43.43.710, both statutes are harmonized. RCW 43.43.710 prohibits the disclosure of the same type of information that the CRPA prohibits - nonconviction data.

Since the requested records in this case were for cases that resulted in a conviction, RCW 43.43.710 is not an “other statute” exempting disclosure.

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2. If the statutes cannot be harmonized, then the CRPA controls as the specific statute.

“[W]hen two statutes are in apparent conflict, the more specific statute is given preference.” *In re Kerr*, 134 Wn.2d at 337, 949 P.2d 810. If the two statutes cannot be harmonized by limiting RCW 43.43.710 as stated above, then the CRPA controls as the more specific statute. The CRPA contains no exemption for the requested records.

Since an “other statute” exemption must be explicit and not implied, RCW 43.43.710 is not a valid “other statute” for the purposes of exempting the requested records.

**C. Plaintiff requests attorney fees on appeal.**

RCW 42.56.550 requires an award of attorney fees for a successful PRA challenge. RAP 18.1(b) requires a request for attorney fees on appeal to be included in the opening brief. Washington state law authorizes an award of attorney fees to *pro se* litigants who are attorneys. *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991).

CONCLUSION

Based on the foregoing, the Court should find WSP in violation of the PRA and reverse and remand with instructions to impose penalties, fees, and costs.

This document contains \_\_1,817\_\_ words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,



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Vitaliy Kertchen #45183

Date: 11/24/22



DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 11/24/22, I served this document on the Washington State Patrol by uploading it using the Court's e-filing application and emailing a copy of the document using that process to all registered users.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,



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Vitaliy Kertchen #45183  
Date: 11/24/22  
Place: Tacoma, WA

**KERTCHEN LAW, PLLC**

**November 24, 2022 - 9:59 AM**

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